

EXHIBIT B

- VOLUME 1 -

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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F'REAL FOODS, LLC and RICH	:	CIVIL ACTION
PRODUCTS CORPORATION,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
HAMILTON BEACH BRANDS,	:	
INC., HERSHEY CREAMERY	:	
COMPANY and PAUL MILLS	:	
d/b/a MILLS BROTHERS	:	
MARKETS,	:	
	:	NO. 16-41 (CFC)
Defendants.	:	CONSOLIDATED

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Wilmington, Delaware
Monday, April 29, 2019
9:08 o'clock, a.m.

- - -

BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J., and a jury

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APPEARANCES:

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
BY: RODGER D, SMITH II, ESQ.,
MICHAEL J. FLYNN, ESQ. and
TAYLOR HUGA, ESQ.

-and-

Valerie J. Gunning
Official Court Reporter

1 APPEARANCES (Continued):

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11 -and-

12 DRINKER BIDDLE & REATH LLP

13 BY: WILLIAM S. FOSTER, JR., ESQ.,
14 BRIANNA L. SILVERSTEIN, ESQ. and.
REEYA THAKRAR, ESQ.
15 (Washington, D.C.)

16 Counsel for Defendants

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Farrell - cross

1 Q. Some does. And if I left the cup there in the cup
2 holder, those doors were also prevent the rinse water from
3 getting to the cup as well; is that right?

4 A. Yes.

5 Q. Yes, it would?

6 A. Yes.

7 Q. So those doors kind of shield the area where that cup
8 holder and the cup is, correct, from the rinse fluid?

9 A. Yes.

10 Q. Could I have Figure 2 and 3 of the patent.

11 And Figure 2 and 3 of the patent, is that the
12 same disc blade that we saw in the B2 blender on the table
13 here?

14 A. It's very similar.

15 Q. It's very similar?

16 A. There's some differences.

17 Q. Does the B4 also use the flat disc like the B2?

18 A. Yes. It's almost the same.

19 Q. Almost the same.

20 And can I ask you to take a look in your binder
21 at Defense Exhibit 391.

22 A. Okay.

23 Q. Mr. Farrell, do you recognize what Defense Exhibit 391
24 is?

25 A. Yes. It's a drawing of a version of this kind of a

1 So here is the question I have for you all.
2 Complicated, as so many issues are in this case because it's
3 an inherited case, and it's a case of the doctrine we all
4 know called law of the case. There are standards for
5 reconsideration. And then there is, as I understand it,
6 case law, and in particular, I'm thinking about a decision
7 by Judge Bryson, which talks about that claim construction
8 may have to be revisited at any point in the trial. It's
9 the obligation of the Court because it is a question of law
10 to instruct on construction.

11 So the first question I have is: The jury books
12 that have been provided to the jury, do they have already as
13 an exhibit the claim construction?

14 MR. FLYNN: They do, Your Honor.

15 THE COURT: I'm going to have them removed this
16 evening from the jury's part.

17 And then the second question I have for you all
18 is, and I will invite you to brief it if you want by
19 submitting no more than a 750-word letter in 14-point font
20 by close of business tomorrow that would address this issue,
21 which is, what if during the course of the trial when I hear
22 evidence and it makes me think that there is an erroneous
23 claim construction, what is it I'm supposed to do under
24 Federal Circuit law? In other words, do I reconstrue the
25 term? Do I just let it go? What are my obligations under

1 the law?

2 All right. Any questions?

3 MR. SMITH: Your Honor, at the risk of being
4 held in contempt, are there particular terms you have in
5 mind that may be helpful to build into that question?

6 THE COURT: No, there aren't. In fact, I know
7 it's a loaded question potentially.

8 MR. SMITH: Right.

9 THE COURT: I can imagine you sitting there, but
10 it occurs to me, it's a great example of one of the problems
11 with claim construction, right, is that you are making the
12 decision, to some extent, in a vacuum. Certainly, you're
13 making it without being fully informed of the background
14 facts and how the invention supposedly works, and that is
15 compounded here because there were constructions made before
16 I had any familiarity with the case, and you all asked me to
17 reconsider Judge Sleet's constructions, which I'm pretty
18 much inclined to do.

19 And in making that determination, you look to
20 law of the case, you look to the standards for
21 reconsideration, and yet the irony is, it's de novo review
22 of a matter of law, and so, you know, you all try this case
23 oftentimes, these types of cases, essentially to make your
24 pitches to the Federal Circuit.

25 So I do not, have not made a decision to

Farrell - cross

1 from getting --

2 Q. Isn't it true that doors 36 shield the access
3 location?

4 A. Yes, they definitely help. So does the front door.

5 Q. Thank you?

6 MR. FOSTER: Let's go to the '662 patent,
7 please, and go to claim 1 of the '662 patent.

8 BY MR. FOSTER:

9 Q. And do you see here, this is a similar limitation we
10 just discussed, but it has the word isolating instead of the
11 word shielding?

12 Do you see that?

13 A. Yes, I do.

14 Q. And, again, those doors 36 help isolate the cup holder
15 from the rinsing fluid during rinsing, don't they?

16 A. They help, yes.

17 Q. Okay.

18 A. They are not the only thing doing it, but they help.

19 Q. And then let's take a look at claim 18, please.

20 And, again, claim 18 says, the directing step
21 includes allowance rinse fluid flowing off of the splash
22 shield to contact the door and then flow down the slope
23 and off the door into a receiving channel and into a
24 drain?

25 Do you see that language highlighted on a

Farrell - cross

1 Q. Yesterday you said you can see the bulk of stuff
2 without reading the patent.

3 A. Sorry. I didn't understand what you said. I'm
4 trying to read it. Un-shielding the vessel opening and
5 directing rinsing fluid onto the splash shield. Okay. So I
6 see it.

7 Q. All right. And so, Mr. Farrell, those doors 36 help
8 isolate the vessel 14 below from the rinsing fluid, don't
9 they?

10 A. Yes, they help.

11 Q. All right. Mr. Farrell, can we just talk real quick
12 about f'real's business model when you were present in the
13 company.

14 When you were running f'real, you sold blenders
15 to your customers?

16 A. Yes, we did.

17 Q. And, Mr. Farrell, wasn't it pretty key to your
18 business that f'real was able to recoup the cost of its
19 blenders?

20 A. Sure. That would be true for any business.

21 Q. And, Mr. Farrell, isn't it also true that having your
22 customers buy the blender would provide them with additional
23 motivation to sell as many cups as they could in order to
24 recoup their blender costs?

25 A. I mean, they're in business to sell milkshakes, so I'm

Akemann - cross

1 CROSS-EXAMINATION

2 BY MS. SILVERSTEIN:

3 Q. Good morning, Dr. Akemann.

4 A. Good morning.

5 Q. I want to first start by going over some of your lost
6 profits opinion that you shared with the jury yesterday.

7 It's true that in June of 2014, which was a few months
8 before the lawsuit was filed, that f'real had a blender in
9 approximately 12,600 locations; is that correct?

10 A. That sounds approximately correct, yes.

11 Q. And as of that date, they had blenders in all 50
12 states; is that correct?

13 A. I believe that's correct.

14 Q. And Mr. Guzdar testified yesterday that they currently
15 have over 18,000 blenders as of today; is that correct?

16 A. I think that's correct.

17 Q. So since the lawsuit started, f'real has gained 6,000
18 locations; is that correct?

19 A. Approximately.

20 Q. Okay. And at its peak, according to your analysis,
21 Hershey's had only 800 locations for its Shake Shop Express
22 program; is that correct?

23 A. That's approximately correct, yes.

24 Q. Okay. Now I would like to turn to the make up of the
25 f'real and Shake Shop Express customers.